No. 12,376

United States Court of Appeals
For the Ninth Circuit

CITY AND COUNTY OF HONOLULU,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR A REHEARING ON BEHALF OF APPELLANT, CITY AND COUNTY OF HONOLULU.

FRANK A. McKINLEY,
Acting City and County Attorney of Honolulu,
Honolulu 13, Hawaii,
Attorney for Appellant and Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 12,376

IN THE

United States Court of Appeals

For the Ninth Circuit

CITY AND COUNTY OF HONOLULU,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR A REHEARING ON BEHALF OF APPELLANT, CITY AND COUNTY OF HONOLULU.

To the Honorable William Denman, Presiding Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

The appellant, City and County of Honolulu, feeling itself aggrieved by the opinion filed in this Court on April 13, 1951, comes now and respectfully petitions this Court for a rehearing. The premise of this petition is that the opinion, in effect, destroys that protection afforded by the Fifth Amendment of the United States Constitution relating to the taking of property without just compensation.

I.

THIS COURT RECOGNIZED THAT THE STREETS CONSTITUTE AN ASSET OF SUBSTANTIAL VALUE WHICH COULD HAVE BEEN LIQUIDATED PRIOR TO THE TAKING.

The opinion, as we analyze it, recognizes the following stated propositions and concerning which the appellant is in thorough agreement:

1. The appellant, City and County of Honolulu, is entitled to the protection of the Fifth Amendment in the taking of its property by the United States Government.

2. Such property is considered to be "private property" for the purpose of being entitled to just compensation under the Fifth Amendment.

3. The stipulation by and between the Territory of Hawaii and the City and County of Honolulu on the one hand and the United States Government on the other, filed on March 24, 1948, merged, for the purpose of being entitled to compensation, the interest of the Territory of Hawaii and its political subdivision, the City and County of Honolulu.

4. The fee of the 34.03 acres of roads, streets, and highways, lying within the Pearl City Peninsula and taken by the Federal Government, was in the Territory of Hawaii.

5. Such fee was subject to an easement in the public for road purposes.

6. The Board of Supervisors of the City and County of Honolulu had the power to disencumber such fee by adopting a resolution of abandonment.

7. The Territory of Hawaii could thereupon deliver merchantable title to the fee so disencumbered.

The foregoing outline is summed up by the Court in that sentence of the opinion which reads:

> "Being owned by the territory in fee simple,[9] they could have been sold by the Territory if they had been abandoned and had not been taken by appellee.[10]"[1]

II.

DISTINGUISHING THE CHICAGO, BURLINGTON AND QUINCY CASE.

The point of departure between the rationale of the opinion and the thinking of the appellant lies in the next two sentences which read:

> "However, they were not abandoned, and nothing in the record shows or tends to show that they would have been abandoned if they had not been taken."
>
> "The probability of such abandonment, if any such probability existed, was too remote to be considered in determining the question of compensation." Cf. *Chicago, Burlington & Quincy R. R. Co. v. Chicago,* 166 U.S. 226, 250-251.)[2]

We respectfully submit that the principle of the *C. B. & Q.* case cited as authority for the last proposition is not applicable to the case at bar for the following stated reasons:

---

[1] *City and County of Honolulu v. U. S.,* No. 12,376, April 13, 1951, Opinion of U. S. Court of Appeals for the Ninth Circuit, page 3.

[2] *City and County of Honolulu v. U. S.* ibid.

In the *C. B. & Q.* case, the City of Chicago proposed to extend Rockwell Street across the right-of-way of the C. B. & Q. Railroad. It was contemplated that the parcel of land identified as lying within the intersection of Rockwell Street extension and the railroad right-of-way was to be used jointly for railway and street purposes. Thus, the City of Chicago sought to impose an easement for street purposes upon that parcel forming the intersection, but without impairment of the ability of the railroad to continue to function. The Illinois Supreme Court denied more than nominal compensation. It is desired to point out that the economic utility of the fee of such intersection had been appropriated by the railroad in serving its other property forming a continuous and uninterrupted railway right-of-way. Had the railway conveyed out the fee without reserving a railway right-of-way easement, the value of the remaining right-of-way property as a railroad would be destroyed. On the other hand, the purchaser of such fee, if encumbered by a railway easement, could never hope to obtain clear title without payment of an exorbitant sum to the railroad; a sum tremendously in excess of the market value of the parcel in question. Also, the imposition of the additional easement for street purposes onto the easement for railway purposes enabled the railroad to continue to function and diminish neither the value of its fee nor the value of its easement.

Let us take the principle of the *C. B. & Q.* case and apply it to one of the streets in the Pearl City Penin-

sula. Suppose the Navy Department acquired two parcels of land in the Pearl City Peninsula lying across the street from one another. Suppose also, that it was proposed that buildings be erected on each parcel and that the buildings were to be connected by basement, main floor and second floor runways; and further, that easements were sought to be acquired to carry out this plan and that such easements were to be superimposed on the easement for street purposes, so that that parcel identified as lying within the intersection of the street and the subterranean, surface and elevated runways, could function jointly as a street and a connecting way for the two buildings. Could it be expected that the Territory under such circumstances would be entitled to anything other than nominal compensation? Clear title to the intersection could not be delivered without destroying the function of the remainder of the street.

But now let us apply the principle of the streets in Pearl City Peninsula to the *C. B. & Q.* case. The streets in Pearl City area form a cul de sac network; such network would function to a street system as a spur line, to a railway system. Suppose the City of Chicago proposed to extend Rockwell Street for a distance of 25,000 feet over and upon the entire *spur* line of the railroad? Also, that the proceedings in eminent domain call for the acquisition of the fee and the extinguishment of all encumbrances. Can there be any doubt but that the railroad in such circumstances would be entitled to substantial compensation for the taking of its spur line property and the

extinguishment of its right to operate thereon? In the case at bar, the entire network of streets, excepting only Lehua Avenue, is acquired in fee, along with the total and complete extinguishment of easement for road purposes, and to that end, the Territory of Hawaii and its political subdivision, the City and County of Honolulu, were made parties defendant as being the owner of the fee and the holders of the easement.

The fact that both the fee was acquired and the easement extinguished was stressed in appellant's opening brief from page 38 which reads:

> "It is desired to invite the Court's attention to the fact that the taking by the United States government deprives the public of the right to use said streets. Owned as they now are by the United States government and appropriated by the Navy Department for a Pearl Harbor Defense perimeter, the public would have no more right to use those streets than it would the streets in the Pearl Harbor Navy Yard, where one cannot gain access without a special pass. In fact, that was the very purpose of the taking—to exclude the Public from the waters of Pearl Harbor —to create a security perimeter by such exclusion."

It is respectfully submitted that since the fee was held subject to being cleared by the single act of abandonment by the Board of Supervisors of the City and County of Honolulu, in adopting a resolution thereof, the value was in the fee at the time of the taking, irrespective of the proximate or remote in-

clination of the Board of Supervisors to liquidate such value. Need a railroad have a proximate inclination to liquidate its spur line as a condition precedent to creating value therein? Is not the correct view that the capacity of the owner to terminate the license at will and convey out, free and clear, establishes the owner as being entitled to the full value of the fee at the time of the taking? And this is so, irrespective of whether the fee is being put to a use or purpose, which, until extinguishment, destroys the market value.

III.

DISTINGUISHING THE CALIFORNIA CASE.

The second point of departure between the rationale of the opinion and the thinking of the appellant lies in the Court's reaffirmance of the rule that the cost of substitute roads, where necessary, is the exclusive measure of damages and this is so, irrespective of whether the taking, includes a fee which could have been abandoned and sold for a substantial consideration. Such paragraph is summed up by its concluding sentence which reads:

> "Therefore, the Territory was not entitled to more than nominal compensation,[13] and this is true despite the fact that the condemned highways were owned by the Territory in fee simple[14]."[3]

Aside from the *Benedict* case, which was discussed at length in the California opinion, there is only one case

---

[3] *City and County of Honolulu v. U. S.*, supra, page 3.

on point concerning the taking of the fee—that is the case of *United States v. California* (*California v. United States,* 9 Cir., 169 F. (2d) 914) decided by this Court. The facts and the record of the *United States v. California* can easily be distinguished from the case at bar, so that we earnestly request the Court to reconsider its view.

As pointed out in the Opening Brief concerning the *State of California v. United States,* page 31:

> "Said streets were, however, twenty feet under water."

Moreover, in re-examining the California Decision it appears that the State of California neither showed nor offered to show that the fee of the streets, twenty feet under water, had more than nominal value. In such circumstance, in the absence of such proof or offer of proof, would not this Court be correct in concluding that the State of California was entitled to no more than nominal value for the taking of its fee?

In the case at bar, it has been continuously asserted by the appellant that the fee taken has more than nominal value. Moreover, this Court has recognized that the streets could have been abandoned and sold prior to taking.

IV.

SHOWING WIDE DEPARTURE IN PRESENT MEASURE OF COMPENSATION FROM THAT OF UNITED STATES v. BROWN.

Concerning the true measure of compensation applicable to the taking by the Federal government of a municipality's streets, we desire to point out that such measure of compensation has shaped-up in seven different phases:

(a) "* * * It would be difficult to place a proper estimate of the value of the streets and alleys to be destroyed and not be restored in kind. A town is a business center. It is a unit. If three quarters of it is to be destroyed by appropriating it to an exclusive use like a reservoir, all property owners, both those ousted and those in the remaining quarter, as well as the state, whose subordinate agency of government is the municipality, are injured. A method of compensation by substitution would seem to be the best means of making the parties whole." *U. S. v. Brown,* 263 U.S. 77 at page 83; Appellant's Reply Brief, pages 2 and 3.

(b) In the event that substitute roads are required to be constructed by the taking, the Federal government discharged its constitutional liability in constructing such substitute roads. *U. S. v. Wheeler Township,* 66 F. (2d) 977; *Jefferson County v. Tennessee Valley Authority,* 146 F. (2d) 564.

(c) As between the construction cost of the road taken and the construction cost of the substitute, necessitated thereby, the construction cost of the substitute is the exclusive measure

of damages. *U. S. v. Los Angeles,* 163 F. (2d) 124; *U. S. v. Arkansas,* 164 F. (2d) 943.

(d) In the event no substitute roads are required, then the municipality is entitled to no more than nominal compensation. *U. S. v. Des Moines,* 148 F. (2d) 448; *U. S. v. Baltimore,* 147 F. (2d) 786; *U. S. v. Woodville, Oklahoma,* 152 F. (2d) 735.

(e) When no substitute roads are necessary, it follows that no compensation is allowed, but salvage value of a street facility will be allowed ($5,303.00 salvage value for bridge). *U. S. v. City of New York,* 168 F. (2d) 387 at 389-390.

(f) Such exclusive measure applies, even though the Federal government took the fee. *U. S. v. California,* 169 F. (2d) 914.

(g) This is true even though the municipality, prior to taking, could have abandoned said fee and caused it to be conveyed out for a substantial consideration. *City and County of Honolulu v. U. S.,* No. 12,376, April 13, 1951, Opinion of CCA 9.

This Court's attention is invited to the fact that in only one case awarding only nominal compensation, does the opinion discuss *U. S. v. Brown,* supra, and that case was *Baltimore v. U. S.,* supra, involving the condemnation of an easement. After quoting *U. S. v. Brown* at length, the Court in the *Baltimore* case states at page 791,

"In the pending case the City had made no improvements whatsoever to the alleys when they

were taken by the United States, but had merely accepted the dedication without any expenditure on its part. The alleys are now closed and there is no need either to reopen them or relocate them elsewhere. When taken they had no market value and their extinction imposed no obligation upon the City to replace them."

For a further discussion of the *Baltimore* case, reference is made to Appellant's Opening Brief, pages 21-25, 37-38 and Appellant's Reply Brief, pages 2, 3.

V.

APPLICABILITY OF UNDERLYING PRINCIPLE OF UNITED STATES v. OLSON.

Since, for the purposes of being entitled to the protection of the Fifth Amendment, the taking from a municipality is the same as the taking from an individual, it is felt that the basic principle inhering in *United States v. Olson* (292 U.S. 246), applies in the instant case. If the City and County is entitled to the protection of the Fifth Amendment when the Federal government takes its property, then can the judiciary formulate an exclusive rule of compensation, the application of which will deprive the City and County from liquidating what substantial value it has in the fee taken? If the application of such an exclusive measure of damage is sound, then there is no reason for it not to apply to every service ramification of local government: parks, playgrounds, schools, libraries and all branches of government, including

their one-purpose structures, save only that of the tax collector's office.

VI.

PRESENT MEASURE OF COMPENSATION IS SUSCEPTIBLE OF UNSCRUPULOUS USE.

The appellant's final comment on such measure of compensation as it has evolved within a period of a few years, is that it places a tool in the hands of the executive branch of the government which is susceptible of unscrupulous use. Quoting from pages 1 and 2 of the Reply Brief:

> "Appellee, while conceding that streets are 'private property' within the meaning of the 5th Amendment (Appellee's Br. 4), asserts, in effect, that it has the right, after deliberately selecting a peninsular perimeter whose taking requires the construction of no substitute streets, to condemn first the land area within the perimeter, then condemn the street area within the perimeter and pay therefor the sum of only One Dollar ($1.00), irrespective of the magnitude of the street area taken or the vastness of the sum of tax money reflected in the completed thoroughfares."

VII.

CONCLUSION.

The appellant, City and County of Honolulu, therefore respectfully submits to the Court that its former opinion in this case is in error in the particulars above

noted and in conflict with the basic principle of *United States v. Brown,* supra and *U. S. v. Olson,* supra, and that this Petition for Rehearing should be granted in order that the circumstances of this case and the conflict between the opinion in this case and the basic principles of *United States v. Brown,* supra, and *United States v. Olson,* supra, may be more fully presented to this Court.

Dated, Honolulu, Hawaii,
May 11, 1951.

Respectfully submitted,
CITY AND COUNTY OF HONOLULU,
Appellant and Petitioner,
By FRANK A. MCKINLEY,
Acting City and County Attorney of Honolulu,
Attorney for Appellant and Petitioner.

Certificate of Counsel

I hereby certify that the foregoing petition for a rehearing is not interposed for delay, and that in my judgment the same is well founded.

Dated, Honolulu, Hawaii,
May 11, 1951.

Frank A. McKinley,
Acting City and County Attorney of Honolulu,
Attorney for Appellant
and Petitioner.